IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6424 of 1991

with
SPECIAL CIVIL APPLICATIONS NOS. 6425, 6426 AND 6382 OF 1991

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MIHIR TEXTILES LTD

Versus

DY. COMMISSIONER OF INCOME TAX

Appearance:
MR JP SHAH for Petitioner
MR B.B.NAIK WITH MR M.R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 26/11/98

ORAL JUDGEMENT

Per Balia,J.

These four petitions are by the same petitioner challenging the notices under section 148 of the Income

tax Act, 1961 for different assessment years from 1981-82 to 1983-84. The notice has been issued on 19.2.1991 for reassessing the income of each of the four assessment years referred to above.

The only contention raised in these petition is about the jurisdiction of the assessing officer to initiate proceedings. According to the petitioner, there being no failure on the part of the assessee to disclose fully and truly all material facts necessary at the time of initial assessment, the assessing officer could have no reason to believe that income of the assessee escaped in assessment on that count. The escapement of income, if any, having not been as a result of failure on the part of the assessee to disclose fully and truly all material facts necessary at the time of initial assessment, after expiry of four years from the end of relevant assessment year, the assessing officer does not acquire any jurisdiction to initiate proceedings under Section 147. The petitioner has,therefore, sought a writ of prohibition. No reply to the petitions has been filed but a copy of reasons recorded for initiating proceedings under section 148 has been submitted for perusal of the court. The reasons recorded for all the four assessment years in one note sheet are reproduced hereunder:

" The revenue audit has raised the following objection in this case in January 1990 in a half margin memo as under;

It was held by the Gujarat High court in July 1981 that there is no 'manufacture' as to attract the levy of central excise duty when unsized yarn is sized. However, the Government amended in February 1982 the Central Excise Rules, intending to levy duty on intermediate products consumed or utilised in the manufacture of final product, by introducing the concept of deemed removal. Thereupon, the central excise department issued show cause notices to manufacturers of fabric, consuming yarn after sizing it, intending to levy the duty on sized yarn. The matter was challenged through writs filed before the Supreme court. While deciding the constitutional validity of the notification the court ruled on 30th October 1987 that there was no manufacture when unsized yarn is sized.

Scrutiny of the assessment records of an assessee company for A.Y. 1983-84 ,. the assessment for which was completed on 31st March 1986, disclosed

that the assessee had been allowed deduction amounting to Rs. 90,61,931 in the assessment for the earlier years on account of unproviding for liability towards central excuse duty on sized yarn and the claim for deduction of Rs. 40,06,222/- made by the assessee for A.Y. 1983-84 was disallowed in the assessment made in March 1986, but was allowed by the Commissioner of Income tax (Appeals) in February 1987.As mentioned above, at no point of time, there was a liability, since there was no manufacture. The impugned notification did create fictional removal but it did not create fictional manufacture and therefore, there was no liability to central excise duty as decided by the Supreme court in October 1987. In these circumstances, the deductions allowed to the assessee are required to be withdrawn. Omission to do so has resulted in short levy of tax of Rs 74,91,791/in the aggregate.

In view of the above and in the case of the assessee, substantial amount of excise liability on sized yarn has been allowed at the time of assessment stage or after the appellate decisions.

Since the assessee was not entitled to the deduction allowed on the amount of central excise duty, the same requires to be withdrawn by resorting to the provisions of section 148 of the Act.

The office of the undersigned was directed to put up the necessary proposal vide letter No. HQ I/61-Gen/90-91 dated 26.6.1990. Accordingly, the proposal is being put up."

The reasons recorded by the assessing officer nowhere attribute any failure on the part of the assessee either to furnish return or to furnish truly and fully all material facts necessary for assessment. The reasons disclosed go to show that the assessee who is maintaining his books of account on mercantile system , has claimed deduction in respect of excise duty which was payable according to the excise department where unsized yarn is processed into sized yarn by considering it to be 'manufacture' notwithstanding that the assessee was claiming such relief on the ground that making sizing of

yarn from unsized yarn is not a manufacturing process attracting excise duty. On the basis of this claim of excise department about which there was dispute between the assessee and the excise department, deduction of such amount was allowed as allowable deduction. The assessee ultimately succeeded before the Supreme court vide order dated 30.10.1988 where the court held that there was no manufacture when unsized yarn is sized.. The assessing officer has opined that omission to withdraw the deductions allowed in the relevant assessment year has resulted in short levy to that extent and that is why these notices are being issued. The reason clearly discloses that belief is not even entertained that such short levy in the original assessment is on account of non-filing of return or on the failure on the part of assessee to disclose truly and fully all material facts necessary for the same . On the contrary, it was on the disclosure of all necessary facts that by taking into consideration the claim, the claim was allowed. Moreover,the learned counsel for the assessee stated that since filing of the return , the assessee has voluntarily included the amount so allowed for the assessment years 1981-82 to 1983-84 by way of income of that year under section 41 of the Income tax Act and considering that assessment, the amount of deduction claimed by the assessee for this assessment year has been accounted for.

As initiation of proceedings is not on account of failure on the part of assessee and under proviso to Section 147 , limitation for initiation of proceedings is only four years from the end of assessment year concerned , it needs no further elaboration that initiation of proceedings in each of the four assessment years is beyond four years from the end of the relevant assessment year and the assessing officer had no jurisdiction to initiate proceedings after four years in respect of assessment years 1981-82 to 1983-84 on 19.2.1991 .

The impugned notices are,therfore, without jurisdiction and are hereby quashed. Respondents are prohibited from proceeding further in pursuance of these notices. Rule made absolute. There shall be no order as to cost.

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